No. 2760

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HALVORSEN TRANSPORTATION COMPANY (a corporation), J. B. ARKISON, H. C. HALVORSEN, GEORGE W. DORNIN, C. R. CODDING, G. C. CODDING, P. S. COLBY and A. M. DEVALL, and a certain barge and the gasoline launch "SEVEN BELLS", her engines and machinery and appurtenances,

Appellants,

vs.

V. J. B. CHEDA,

Appellee.

BRIEF FOR APPELLEE.

H. W. HUTTON,
Proctor for Appellee.

Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of Facts.

In this case, Halvorsen Transportation Company, held itself out as a common carrier of goods between San Francisco and San Rafael, California. The fact of its being a common carrier is alleged in the libel (Transcript, page 11); it is not denied in the answer, and the proof shows it to have been such; its barge upon which goods were carried, had

no motive power and the carrier had a contract with the owners of a tug boat known as the "Seven Bells", to, in all intents and purposes, do the carrying, the goods in question in this case, were laden on board of the barge at San Francisco, December 30, 1913, for carriage to San Rafael. The weather was somewhat, but not violently, stormy; the barge and tug started out on the voyage, but the tug which had previously shown itself to be of insufficient power to properly handle the barge in fine weather, *which they all knew,* found itself unable to handle the barge in the weather that then prevailed and the expedition put back to the seawall in San Francisco where it laid over night. At about 7:30 or 8 next day the weather had moderated somewhat, but the wind was again beginning to increase (pages 45, 46), and the sea was running still (page 118). They started without any investigation as to what the sea or weather was (pages 125-126). The wind was again increasing in force, the velocity being as follows, as shown by the United States Weather Bureau:

6 to 7 A. M.	18 Miles.
7 to 8 A. M.	22 Miles.
8 to 9 A. M.	21 Miles.
9 to 10 A. M.	23 Miles.
10 to 11 A. M.	26 Miles.
11 to 12 A. M.	25 Miles.
12 M. to 1 P. M.	33 Miles.

Those being the average velocities for the hour (pages 137-138) storm signals were raised in San

Francisco by the United States Weather Bureau at 7:30 A. M. on December 30th, and were displayed continuously until 7 A. M. January 1st (page 138).

At San Rafael, the destination of the vessel, the wind had not moderated during the night (page 77). There was telephone communication between San Francisco and San Rafael; the master of the tug did not ring up or ascertain the condition of the weather at San Rafael, but started out on an increasing wind at San Francisco, proceeded on his voyage and before he arrived at San Rafael ran into, *not a sudden storm,* but *ran into a wind that had been blowing all the time, where it was encountered* at this time. The barge was an unusual barge, had a large house on its deck, which of course offered area and resistance to the wind, and, instead of the tow boat towing the barge, the barge towed the tow boat. Finally, to save the tow boat, they cast off the hawser that connected the two vessels, and the barge went on shore. Some of the goods on board washed overboard; some were stolen; some sold by the Halvorsen Transportation Company who kept the money, but none of the shippers either received their goods or their value, excepting Cheda & Company who received a portion of what their goods were sold for after the trial had commenced. Of course in human affairs some force of nature in the nature of a storm could at one time have arisen, to some extent suddenly and overtaken a venture, although storms at

all times give warning to experienced persons; there is a lowering of clouds, something in the atmosphere, or some other premonition that always foretells a storm; but since the United States Weather Bureau has been established there has always been scientific knowledge in advance that a storm is coming, and such knowledge is almost as exact as the fact that the sun or moon will rise at a given time in a given locality. But in this case, as we have stated, the adventure did not encounter a storm that arose suddenly; it ran into a high wind that had been in existence for at least a day at the locality of its maximum violence, and the tug boat, found itself, as might have been expected, entirely unable to handle the barge and the barge went ashore and the goods were lost. In this case, of course, the barge and tow boat were the instruments of a common carrier used in performing the duties it owed to the goods he had contracted to carry. It was the duty of the carrier to see that all the instruments of the service were adequate and sufficient for the service, *and the burden rested upon the carrier to show why the goods had not been delivered to the consignees.* In this case, however, the carrier *showed nothing.* All the evidence, however, showed that the motive power selected by it, and of course over which the shipper had no control, was entirely inadequate for the venture and was known to be inadequate. We will take up the argument of this case by *citing testimony.*

Argument.

I.

THE TUG WAS OF INSUFFICIENT POWER, AND THE CARRIER KNEW IT.

Testimony of Silva (page 48):

"A. Yes, the towboat I don't thing is strong enough in that kind of weather."

Testimony of one of the Gilmores (page 111):

"Q. Was she (the barge) dragging the towboat?

A. She was backing up a little on the towboat.

Q. She was dragging the towboat instead of the towboat dragging the barge.

A. Yes, she was backing it back.

Q. In other words, the wind was so strong then that the towboat did not have power enough to hold the barge against it, and the barge was pulling the towboat back; that is what you mean by backing it, is it not?

A. I don't know what you mean, I say the barge was backing the towboat up at the time.

Q. You mean by that that the barge was pulling the towboat in the opposite direction from the way the towboat wanted to go.

A. You mean at the time we let her go?

Q. Yes?

A. Yes, sir.

Q. How long had she been doing that?

A. About ten minutes."

Page 112:

"Q. And far had you drifted in that ten minutes?

A. We didn't drift hardly at all; we found out we were losing though."

Testimony of A. H. Gilmore (page 132):

"Mr. HUTTON. Q. You didn't have power enough to pull it?

A. No, sir.

The COURT. Q. It was because of lack of power?

A. Yes, sir, and on account of the power not being on the water.

Q. It finally resulted in the barge pulling you, instead of you pulling the barge, is that correct?

A. Yes, sir, the boat drifted backwards."

Testimony of J. M. O'Brien, superintendent for Halvorsen Transportation Company (page 150) testifying as to a conversation with the owner of the "Seven Bells":

"Q. What was the substance of that conversation?

A. Well, the barge was too big for him to handle with the house on it.

Q. Did you ever have any accident prior to this time?

A. Not on account of the towing. It was too hard towing for the boat.

Q. You had never had any trouble prior to this accident?

A. No, sir. Of course we were late many times, but not any such trouble as that.

Q. Well, now, when was the first conversation you had to that effect, with Mr. Gilmore?

A. Well, that I can't tell you.

Q. Was it a month or two before this accident happened?

A. Oh, no. It was a conversation from the time he started to run. He seen that it was too heavy for him to handle."

Pages 153-154:

"The COURT. Q. Did you ever report to the company that Mr. Gilmore was, in your judgment, inexperienced?

A. They knew it; they were going to make a change; they were figuring on some one to take his place, but they were never able to get anyone to take his place.

Q. Who of the Halvorsen Transportation Company did you say anything to about Mr. Gilmore's competency?

A. Well, they knew it themselves. He was fighting with them all the time.

Q. You never talked to them about it?

A. Well Mr. Codding said he was going to make a change just as soon as he could get someone to take his place.

Q. It is only your conclusion as to what you think Mr. Codding knew of Gilmore's competency?

A. It is no conclusion. They knew it.

Q. How do you know they knew it?

A. Well, I have talked to George Codding about it.

Q. What did you say to him about it? (Objection.)

A. He said he would make a change just as soon as he could get somebody to take his place, but he didn't want him to leave him in a hole. He did not want to say much to him because he was afraid Gilmore would quit and leave him in a hole.

Mr. LILLICK. Q. Did you have more than one conversation with Mr. Codding about it?

A. That I could not say. It ran along during that period and I could not say whether I had one or two or a dozen.

* * * * * *

Q. That is just your private opinion?

A. No, from their own opinion.

Q. You mean to say that Mr. Gilmore himself thought that he was not competent?

A. The barge was too big for him. Many a time he would leave the barge up there and go back with the towboat."

We now refer to the testimony of A. H. Gilmore, the master and one of the owners of the "Seven Bells" (page 198):

"Q. Did you ever tell Mr. O'Brien, Mr. Gilmore, that the barge was too big for the 'Seven Bells'?

A. I told him in fact—*I told him of that fact,* yes, sir.

Q. Explain what you mean.

A. I told him for my own benefit in handling it down at Jackson Street, and in those narrow creeks—I told him that just for my own benefit, that is all.

Q. Did you ever tell Mr. O'Brien that the barge was too big for the 'Seven Bells' to handle out in the bay?

A. No, sir."

If the barge was too big for the "Seven Bells" to handle in San Rafael Creek and at Jackson Street in smooth water and sheltered, it was undoubtedly too large for it to handle in rough water. That the "Seven Bells" was not of sufficient power is conclusively shown from the fact that she was unable to handle the barge on the night of December 31st; she had to put back (pages 44, 96 and 97, 117).

It is also conclusively shown by the following testimony of A. H. Gilmore (page 124):

"The COURT. If you had a higher power tow boat, you would have had a boat with a deeper draft, and you would not be in that position at all?

(The Court there referred to where the barge was cast adrift.)

A. No, sir, I would not have been there at all."

Page 132:

"The COURT. Q. When did you first realize you could not make San Rafael Slough?

A. When we started to shorten the tow-line.

Q. When was that?

A. That was about 1000 feet from the mouth.

Q. How far were you then from the channel —I don't mean the channel of the slough, but the channel of those straits there. This is a shoal (referring to chart), and this is deep water. I understand part of the difficulty arose from getting on the shoals and the engine not working. When you realized you could not get in here what was there to prevent you from taking deep water and avoiding those difficulties?

A. We could not get back to deep water this way; you could not go in there against a head sea.

Mr. HUTTON. Q. You didn't have power enough to pull it?

A. *No, sir.*

The COURT. Q. It was because of lack of power enough to pull it?

A. Yes, and on account of the power not being in the water.

Mr. HUTTON. Q. It finally resulted in the barge pulling you, instead of you pulling the barge. Is that correct?

A. Yes, sir, the boat drifted backwards."

In the light of that testimony it was impossible for the court to arrive at any other decision than it did in this case.

The obligations of a common carrier are well known—there is no uncertainty about them. This court has passed upon the question many times as follows: The Medea, 179 Fed. 784:

> "Standard authorities show the first duty of the carrier, and one that is implied by law, is to provide a seaworthy vessel, *well furnished with proper motive power,* and furniture necessary for the voyage."
>
> The Lady Pike, 21 Wallace 1;
>
> The Musselcrag, 125 Fed. 786.

It is abundantly shown here and without contradiction, that this vessel was not supplied within the requirements of the above authorities.

II.

NEITHER THE HARTER ACT OR BILLS OF LADING ARE ANY DEFENSE.

Under the Harter Act the burden rests upon the carrier to show by affirmative proof that he has used *due diligence;* that the tug boat was sufficient; the master competent and the whole outfit sufficient for the undertaking it was engaged in performing.

The law is as follows:

> The Medea, 179 Fed. 784-785.

> "In the case of the Mohler, 88 U. S. 230-233, a cargo of wheat had been shipped on a barge appurtenant to the steamer Mohler at Manukato, on the Minnesota River, destined for St. Paul on the Mississippi. The bill of lading contained the usual exemptions of the 'dangers of navigation'. The barge set up that the accident occurred through the sudden and unexpected gust of wind which overtook the boat as she passed through the pier, and that, therefore, she was unanswerable for the collision. The case was heard on the testimony introduced by the respondents, the libelants having called no witnesses. The Supreme Court held that:
>
> 'The burden of proof lies on the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from his duties which the law has annexed to his employment'."

In this case the respondents offered no proof at all; libelant did, and showed by uncontradicted proof that the tow-boat had not sufficient power to properly tow the barge *at any time.*

III.

THE MASTER OF THE "SEVEN BELLS" WAS INCOMPETENT.

It was the duty of the respondents to show the master was competent; they offered no proof upon that point worthy of consideration; in fact no proof at all, as all we have is that of McLaughlin (pages 189-190).

The facts are: Mr. Gilmore had never been to sea; he had used the "Seven Bells" in conjunction with his brother in peddling vegetables and fruit. A few months before the loss of this cargo they put a larger gasoline engine in the boat and went into the business of towing this barge. O'Brien testified he was not competent (page 148). A competent master would not have started out on the morning he did. Silva testified as to the starting (page 45):

> "Q. How was it the next morning?
> A. It looks pretty bad. After we left there, the wind started pretty strong again."
> * * * * * * *

Page 46:

> "A. I asked the captain if he thought he could make it on that kind of weather, and he said, 'Yes, *I think* I can make it, because daytime is better than night-time, *I think I will make it';* and he said, 'Let go the lines' and I let go the lines. After he left there the wind started pretty strong again.
> Q. How was the sea at the time you left the seawall?
> A. It looks bad, like the night before."

A competent captain would not have left under the circumstances, with the storm signals flying and without finding the conditions that prevailed at San Rafael.

Gilmore, the master, testified (page 117):

> "Q. The next morning, December 31, what time did you leave for San Rafael?
> A. Somewhere around eight o'clock, or a little after.

Q. What was the condition of the wind and weather at that time?

A. The wind had calmed down; *the sea was running pretty good, yet.*"

As to the burden being on respondents to show Gilmore was competent we cite:

The Wildcroft, 201 U. S. 378;

The Cygnet, 126 Fed. 742.

That Gilmore had no right to leave on the morning in question, we cite:

The E. T. Williams, 126 Fed. 871; Affirmed, 71 C. C. A. 357;

Egan v. Southern Towing Co., 189 Fed. 543;

In re McWilliams, 74 Id. 648;

The Nannie Lamberton, 85 Id. 983.

The fact that he did leave is almost conclusive evidence of his incompetency.

IV.

TESTIMONY OF THE WITNESSES CROWLEY, McLAUGHLIN AND DOE IS NOT WORTH CONSIDERING.

First Crowley testified (page 162) that on the morning of the 31st it "had been blowing a little, nothing to speak of, just an ordinary breeze". He is flatly contradicted by every other witness and by the records of the United States Weather Bureau. Those records are unquestionably correct.

But he started out the same morning and got into trouble. On page 165, however, he admits that his boats do not start out unless the conditions are favorable. But it appears that he started out to help the "Albion" which it appears was in trouble on account of the wind such as it was.

This witness again says (page 169) that he would not pay any attention to storm signals. We always supposed the United States Government went to the expense of maintaining that very efficient service to aid mariners. It does help prudent mariners. Anyone who does not pay attention to such signals is certainly not a prudent mariner. This witness, however, renders his whole testimony valueless for the respondents by his answer on page 175:

> "A. We do not take towboats out and try to do anything with them except under favorable conditions, and when there are heavy winds do not handle them at all.
> * * * * * *
> Q. Still you say you would take a chance on a morning like that?
> A. A man has to take a chance."

We do not think it the law for a common carrier or anyone else to take a chance at another's expense.

The witness Doe went out with a gasoline boat that got into trouble. His judgment was at fault also. But of course there is a wide distinction between the case of a boat that has nothing but herself to handle, and one that has a tow to handle.

His boat had as much horsepower as the "Seven Bells" and came near foundering.

McLaughlin, with a smaller barge, also had trouble. It is all very well for so-called experts to testify they would take a chance. The testimony of the experts in this case may seem all right to them; but their ideas do not state the law. The law is:

> The Mohler, 88 U. S. 230, 234:
>
> "Apart from this there is enough in the evidence to establish satisfactorily that the weather had not cleared, nor the direction of the wind changed, and that the boat should either not have left her moorings at Mendota, or have landed at some proper point before the piers were reached. It won't do to say that the wind moderated, and that the officers of the boat thought they could get through without trouble. *They had no right to think so*, for on such a day squalls were like to arise at any moment, and it was bad seamanship, being forewarned, to attempt to go through such a dangerous place in the river.
>
> * * * * * *
>
> Any prudent officer would have stopped until the weather became calm. At any rate it was the duty of the master of the boat in question to have done so, and, failing in this duty, he is chargeable with this consequence of his negligence." * * *

The "Seven Bells" was directly operated by her owners, so the Harter Act does not apply to her.

> Bradley v. Lehigh Valley, 82 C. C. A. 426;
> The Murrell, 200 Fed. 826.

In the case of the William E. Murtaugh, 3 Fed. Rep. 405, the court says on page 407:

> "Thus fifty steamships may run at full speed through a dense fog without disaster, yet if the fifty-first comes into collision with another vessel it would be no answer to the charge of negligence that the fifty did the same thing safely."

Page 408:

> "Many practices grow up in the navigation of the seas, and gain more or less acquiescence, partly from motives of interest, and partly from a supposed necessity of conforming one's business action to what others do under like circumstances in the competition for employment, but such practices if inconsistent with the standard of care and prudence which the courts of admiralty steadily adhere to for the preservation of life and property can receive no countenance from the court."

In the case of the Allie & Evie, there were no signs of a storm when the vessels started. The difficulty was not from lack of power, the loss was occasioned by a sudden squall not reasonably to be expected.

His Honor, Judge Brown, who decided that case subsequently decided the cases of

In re McWilliams, 65 Fed. Rep. 251, and
The Nannie Lambert, 79 Id. 721,

similar to this case, affirmed by the Court of Appeals and heretofore cited, all of which *are opposed in principle to the case of the Allie & Evie.*

V.

HALVORSEN TRANSPORTATION COMPANY SHOULD HAVE SENT THE "GOLDEN EAGLE" TO ASSIST THE "SEVEN BELLS".

It is the duty of the carrier to care for the cargo. Upon learning that the barge had left San Francisco, O'Brien, the agent of the carrier at San Rafael, telephoned his company in San Francisco asking if the barge had left; and upon learning that it had, advised the sending of the "Golden Eagle" to assist the "Seven Bells", stating that he doubted if the "Seven Bells" could make it (pages 81, 144, 145).

That conversation took place about 8:30. The "Golden Eagle" could have been on the ground at 10:30; the barge was not lost until after 12 (page 103). The "Golden Eagle" had about a 70-horsepower engine. Mr. Codding, however, thought he would also take a chance (page 145).

VI.

THE "SEVEN BELLS" IS EQUALLY LIABLE WITH THE BARGE AND OTHER RESPONDENTS.

The law upon that question is that when two vessels are engaged in a joint venture, both are equally liable.

Shipowners and Merchants Tugboat Co. v. Hammond, 218 Fed. 161;

Decision by this court, and many cases cited.

As to the "Golden Eagle", it is not a question in this case as to whether that vessel could have got into San Rafael Creek or not; the cargo was lost because of insufficient power to keep the barge off the rocks. When San Rafael Creek could not be entered, she drifted into shallow water. A more powerful tug would have kept her therefrom, as is abundantly shown by the evidence.

VII.

BRIEF OF HALVORSEN TRANSPORTATION COMPANY.

The first question discussed is, as to where the burden of proof rests.

The law upon that subject appears very clearly in the case of "The Medea" heretofore cited, decided upon a review of numerous authorities. We are unable to reconcile the argument of counsel with that decision; there is some slight difference, however, between that case and this, in this: that in this case the bill of lading introduced in evidence by counsel for Halvorsen Transportation Company, contains the following language:

> "(and the burden, to prove freedom from such negligence shall be on the carrier or party in possession.)"

In the light of that language the argument on pages 6 and 7 of said brief goes for naught. The cases cited are not applicable to this case, except that of "The Folmina", and as we read that case it is opposed to counsel's theory.

The second point is a claim that the barge was seaworthy. A barge to be seaworthy must be possessed either of sufficient motive power on board of itself, or be supplied with other sufficient motive power. This barge was not so supplied, and the court so found on uncontradicted testimony, *and Halvorsen Transportation Company knew it had not sufficient power.*

Notice to O'Brien, who was its general agent at San Rafael (page 141) was notice to the Halvorsen Transportation Company, the owner of the barge.

G. C. Codding, the secretary of Halvorsen Transportation Company, testified (pages 157-158) that O'Brien had talked to him occasionally about the way the Gilmores were handling the business, saying that he did not remember any conversation about the power of the "Seven Bells", and finally said (page 158):

> "*We would have preferred to have a stronger tugboat* at times of very severe winds, but it was very difficult and impossible to get any boat to do better than that, because the draft there, or the channel is very shallow, and you could not use the 'Golden Eagle' in San Rafael Creek. That was the best we could use. We concluded right along we had the best tow available for that purpose."

It would be very difficult to find stronger evidence of negligence or unseaworthiness than is found in that language. The witness admits the tow boat was not strong enough. If it was not, it

was the duty of the carrier to get one that was, and if one could not be obtained that could go into San Rafael Creek, they should have quit business. The carrier took all the risk of continuing in business under the state of facts shown in the testimony.

There is no evidence in this case of due diligence. There is evidence that chances were taken. In the case of The Cygnet, the following appears (page 746):

> "There is no evidence in the record that the owner of the tug, either the record owner or the owner *pro hac vice*, had made inquiries as to his competency. *The petitioner seems to think* it is sufficient to maintain their case that the owner or owners had no knowledge or reason to believe the master was not competent, but this form of statement is not sufficient because it does not comply with the statute, which requires 'due diligence'."

Due diligence was not shown in this case. Evidence of insufficiency of the tow boat and the incompetency of Gilmore is shown by positive testimony, testimony as to his incompetency appearing on pages 148 and 154.

The next proposition advanced is that this was an unusual wind. That is not the testimony; the testimony is that it was not an unusual wind.

Silva testified (page 56):

> "Yes, I seen more than that, but I did not work on that barge."

A witness may give his opinion as to the strength of the wind. No two witnesses ever agree on whether it is a storm or not.

The records of the United States Weather Bureau are the best evidence as to the wind on that day.

Between eleven and twelve when the barge got into difficulties, the wind blew 25 miles per hour; between twelve and one, when she went ashore, it blew 33 (page 137). *It was not even a storm.*

Witness Young of the United States Weather Service (page 137):

> "We call them storm winds when the velocity exceeds thirty-six miles an hour."

The wind of over forty miles per hour referred to by the witness on page 137, refers to December 30th, as we understand the testimony.

At any rate the wind only increased 8 miles per hour between 11 and 12 and 12 and 1. That is not very sudden. At no time did it reach a storm.

But storms are to be expected between November and January, and the weather is not to be depended on (pages 72 and 73).

As to the testimony of the witness Peterson (page 71) he testifies that if he takes out a barge and loses anything he has to pay for it, so what he testified to about whether he would have sent a vessel out must be taken in the light of that testimony, but his testimony should be taken as a whole.

We cannot find many of the provisions claimed to be in the bill of lading on file and introduced in evidence, and conclude counsel by mistake had a copy of a different bill of lading before him when he wrote the Halvorsen Company's brief.

As to limitation of liability, it is sufficient to say, that that is affirmative matter to be pleaded and proved. Assuming it was pleaded *no proof was introduced to show the value of the barge,* so that matter is necessarily ended.

Again, to be entitled to a limitation of liability, the vessel owner must have provided a proper vessel, properly found with power, etc. The court found that this vessel was not properly supplied with power, so how could it decree a limitation of liability?

VIII.

WE NOW TAKE UP ONE MATTER THAT WILL ANSWER FOR BOTH BRIEFS OF THE APPELLANTS.

That is, *the character of the liability of the tug boat.* In the case of The Columbia, 73 Fed. 226, this court had occasion to pass on a state of facts to some extent similar to those in this case, excepting that, in that case, the carrier chartered the barge and tug boat and it is said by this court in that case, on page 237:

> "As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. * * * When the tug made fast

and took in tow the barge, to perform the contract of carriage, the two became one vessel for the purpose of that voyage, as much so as if she had been taken on board of the tug, instead of being made fast there by lines."

Of course ordinarily the liability of a tow boat is not that of a common carrier; but if the carrier charters a tug and becomes owner *pro hac vice* and uses the tug in the service of carriage, the liability of the tug is that of the carrier.

In this case there was not only a charter, *but the tug was really the carrier,* the contract between the Gilmores and carrier reading as follows (Defendant's Ex. 1):

(Heading)

"AGREEMENT.

Between H. C. Halvorsen, party of first part, and A. H. & G. M. Gilmore, party of the second part.

That party of the second part is to haul all freight and express between San Francisco and San Rafael or other work of like nature.

Party of the first part agrees to compensate party of the second part the amount of Four Hundred ($400.00) for each months work.

Party of the second part is to furnish tow boat and men to handle cargo, to the extent of three men. Also fuel for the run.

Party of the first part is to furnish barge for all burden. This agreement (ot) to run for six months certain. Party of the first part has the option to extend this agreement one year further."

Under that contract, the Gilmores were to:

"*Haul all freight and expressage.*"

That is a contract of carriage, not the towing of a vessel.

> "To furnish tow boat *and men to handle cargo,* to the extent of three men."

If this had been a contract of towage, the contract would have simply read towage or the barge.

They were thus to haul freight and expressage, furnish a tow boat, and three men to handle the cargo.

They did all the work. Halvorsen Transportation Company did none of the work, or the carriage; *they simply furnished a barge.*

The fault of leaving in a high sea from a sheltered position at the seawall, and going out in the bay where there was no shelter, was thus the act of one of the joint carriers themselves, and not a fault of navigation.

Some mention is made in one of appellants' briefs about a shipping receipt.

Mr. Cheda testified he would produce one if he had it (pages 86 and 87). Nothing further appears in the record about it. That fact simply raises a presumption that Mr. Cheda could not find such receipt.

The court found among other things in this case (page 199):

> "My conclusions in this case is that while the 'Seven Bells' was able to handle the barges in deep water, or on the flats in fair weather, she was not sufficient to handle the barge on the

> flats in rough weather and that therefore the combination of barge and launch were not sufficient for the business in which they were engaged for weather ordinarily to be expected in winter." * * *

It is a matter of common knowledge that high winds and storms are to be expected in winter—the proof also shows it (page 65):

> "Q. Are you likely to have storms, or not? A. Yes; you cannot depend on the weather for one minute at this time of the year, from November to April."

If this was a sudden storm it was to have been expected, and should have been foreseen; so if the act of God created the storm, if it was a storm, human agency by its neglect contributed to the loss, and there is no excuse.

We respectfully submit that the judgment and decree of the court below should be affirmed.

Dated, San Francisco,
May 27, 1916.

H. W. Hutton,
Proctor for Appellee.